

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re: ) 1998 OAL Determination No. 34  
Request for Regulatory )  
Determination filed by ) [Docket No. 93-011]  
MARTIN K. MAURER ) November 9, 1998  
concerning a policy of the )  
DEPARTMENT OF ) Determination Pursuant to  
CORRECTIONS--rules ) Government Code Section  
regarding reassignment of an ) 11340.5; Title 1, California  
inmate's area of ) Code of Regulations,  
employment ) Chapter 1, Article 3  
\_\_\_\_\_ )

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney  
RAYMOND G. SAATJIAN, Staff Attorney  
Regulatory Determinations Program

**SYNOPSIS**

The issue presented to the Office of Administrative Law ("OAL") is whether a "work reassignment" policy adopted by the warden of the Correctional Training Facility-North ("CTF-N"), in response to a directive from the Director of the Department of Corrections ("Department"), is in fact a "regulation" and is, therefore, without legal effect unless it is adopted in compliance with the Administrative Procedure Act ("APA"). Both OAL *and* the Department have concluded that the policy, which requires the automatic reassignment of inmates who have performed critical work for more than two years, is in fact a "regulation," that must be adopted pursuant to the APA.

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## ISSUE

On September 29, 1992, requester, Martin K. Maurer, an inmate confined to the Correctional Training Facility-North, filed a request for determination with OAL. Requester claims that an administrative decision made by Chief Deputy Warden D. R. Hill, at the direction of the director of the Department, "to rotate inmates who were assigned positions designated as clerical and who had worked in the same assignment for over two years in order to reduce the potential for manipulation and or abuse of such positions,"<sup>1</sup> is in fact an "underground regulation" that is required to be adopted pursuant to the APA.

## ANALYSIS

### **I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?**

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]. . . .* [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.<sup>2</sup>

After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking (subdivisions (c) and (d)). None applies here.

### **II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application *or* the

amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,<sup>3</sup> the California Court of Appeal upheld OAL's two-part test<sup>4</sup> as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncoded rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"<sup>5</sup>

## **Background of the Challenged Rule**

According to representatives of the Department of Corrections who prepared and filed a response in this matter, the memorandum which initiated the change in procedure for "work reassignments" that prompted the request for determination was prepared by the then Director of the Department, James H. Gomez in June 1992 and forwarded to all wardens including, Mr. D.R. Hill, Deputy Warden in charge of CTF-N.

OAL relies upon the written response provided by the Department as well as the written assertions contained in Inmate Maurer's request for determination. After a careful review of the Department's response as well as the request for determination, OAL has concluded that no dispute exists between the parties regarding the procedure in question that was adopted by the Department to reassign inmates who were classified as "critical workers" who held their assigned positions in excess of two years.

There is also no dispute as to the following facts. In 1983, per his expressed wish, the requester was assigned a position as Chief Law Clerk of the Library at CTF-N, a position which he held until 1992.<sup>6</sup> During June 1992, then director of the Department of Corrections, James H. Gomez, instituted a change in procedure that provided that inmates assigned as "critical workers," including the requester, would be rotated out of their assignment after a period of two years in order to reduce the potential for manipulation and or abuse of their position.<sup>7</sup> As a consequence of this newly adopted procedure, the requester in June of 1992 was assigned a different position, at comparable pay, within CTF-N.<sup>8</sup>

The requester filed an objection to his reassignment with local correction officials and requested that he be reassigned to his former position as the Chief Law Clerk of the Library. Inmate Maurer's request for reassignment was denied by CTF-N, whereupon he filed an appeal with the Inmate Appeals Branch at the Correctional Training Facility, on August 25, 1992 before Appeals Examiner D. Martel.

The Inmate Appeals Branch concluded:

“The documentation and arguments presented are persuasive that the institution considers the clerical staff to be sensitive positions which can lead to manipulation and or abuse of their positions. The rotating of clerical staff provides a method to reduce the potential for these problems. . . . The institution’s denial of the appellant’s request is upheld. The appeal is denied.”<sup>9</sup>

On September 29, 1992, Inmate Maurer filed with OAL a request for determination, challenging the “reassignment policy” as essentially an underground regulation that was not formally adopted pursuant to the APA process. In support of his position, Inmate Maurer argues:

“This underground regulation is clearly one which generally applies to all inmates. It certainly goes further that 15 CCR section 3040 and sets forth procedural details that cannot be found in any published code, regulation or operational plan. These reassignments may hamper the goal orientation of the affected prisoners, may reduce the potential for instilling in them good work habits and, thus lessen the possibility of reintegrating them into a law abiding and cooperative society. In many cases the reassignment must have been against the ‘Inmate’s expressed desires and needs’ even though a reasonable expectation exists that at ‘classification committee shall assign each inmate to an appropriate work...program’. 15 CCR section 3040. Thus, the rotation of clerical positions extends well beyond matters relating solely to the management of internal affairs and represents a rule of general application which must be adopted in compliance APA.”<sup>10</sup>

#### **A. IS THE CHALLENGED RULE A “STANDARD OF GENERAL APPLICATION?”**

Initially, it appeared that the challenged rule applied solely to prisoners housed at CTF-N. However, the Department has stated in its response that the procedure in question was intended to apply to *all* inmates within the Department of Corrections who were considered to be “critical workers,” and not merely those “critical workers” confined at CTF-N. The Department states:

“On or about June 1992, CTF-N instituted a procedure that applied

unilaterally to inmates assigned as 'critical workers.' This was pursuant to a memorandum forwarded to all wardens from the former Director of Corrections, James H. Gomez. The contents of the memorandum addressed the issue of inmates assigned as 'critical workers' being rotated out of their alignment after a two year period."<sup>11</sup>

The plain inference to be drawn from the Department's response is that the procedure was intended to apply to *all* inmates at *all* correctional facilities throughout California who were considered to be "critical" workers. The Department states:

"The policy set forth by former Director James H. Gomez does affect conditions of confinement and imposes a standard of required behavior with stated or implied consequence for noncompliance."

The challenged procedure thus applied to all members of a statewide class.<sup>12</sup> Therefore, OAL concludes that the rule contained in the challenged memorandum was a standard of general application.

**B. DO THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?**

Penal Code section 5058, subdivision (a), declares that:

"[t]he director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons . . . ."

Penal Code section 5054 declares that:

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections] . . . ."

The Department asserts in its response that the basis for the adoption of the change in "reassignment of procedures" of 'critical workers' was "necessitated for the

safety and security of staff, inmates and the public.” There is little question that the Director of the Department of Corrections is vested with the authority to adopt regulations providing for, among other things, the “employment” of persons within the “control” of the State prisons, including the authority to assign and reassign inmates to different positions of employment.

The adopted procedure interprets and makes specific the Department’s authority to assign and reassign inmates to specific employment positions. Accordingly, OAL concludes that the challenged policy is a “regulation” within the meaning of Government Code section 11342.

### **III. DOES THE CHALLENGED RULE FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?**

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>13</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>14</sup>

Government Code section 11342, subdivision (g), expressly exempts rules concerning the “internal management” of individual state agencies from APA rulemaking requirements:

“‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*” (Emphasis added.)

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states as follows:

*"Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall

within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implement [a Department rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the Department's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . .*' [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community' . . . [Citation]."<sup>15</sup>

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself [,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody . . . ."

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception . . . ."<sup>16</sup>

OAL concludes that the "internal management" exemption does not apply to the "assignment procedure" adopted by officials at CTF-N pursuant to the departmental directive.

Finally, OAL acknowledges the admission made by the Department that its "reassignment policy" should have been adopted pursuant to the APA,. . . "[t]his

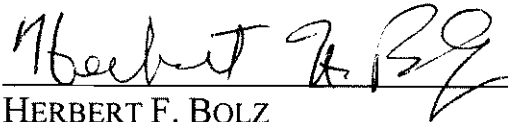


policy should have been processed through the Administrative Procedure Act (APA) process.”<sup>17</sup>

## CONCLUSION

For the reasons set forth above, OAL finds, and the Department of Corrections concurs, that a “work reassignment” policy adopted by the Correctional Training Facility-North pursuant to a departmental directive is a “regulation” and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

DATE: Nov. 9, 1998



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## ENDNOTES

1. Request for determination, pp. 1-2.
  2. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
  3. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.
- Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

4. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

5. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
6. Requester's Petition, dated September 20, 1992. pp. 2-4.
7. Department of Corrections Response, dated September 23, 1998, filed by Pamela L. Smith-Steward, Deputy Director, Legal Affairs Division, p. 1.
8. Requester's Petition, dated September 20, 1992. pp. 2-4.
9. Director Level Decision, Re: Martin K. Maurer, Case No. 9205327, Institution Log No. 92-1163, Order executed by Jack R. Reagan, Chief, Inmate Appeals Branch, dated September 4, 1992.
10. Requester's Petition, dated September 20, 1992. p. 11.
11. Department of Corrections Response, dated September 23, 1998, filed by Pamela L. Smith-Steward, Deputy Director, Legal Affairs Division, p. 1.
12. The Department did not argue that the memo fell within the "local rule" exception, Penal Code section 5058, subdivision (d).
13. Government Code section 11346.
14. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
  - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
  - c. Rules that "[establish] or [fix], *rates, prices, or tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (e).)
  - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract

which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

15. *Grier* (1990) 219 Cal.App 3d 422, 436 fn.10, 268 Cal Rptr. 244, 252-253.) cites *Armistead* citing *Poschman* for support on this point. Note that *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.)
16. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
17. Department's Response. p. 3.